IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

GARY ODOM,	)	
	)	
Plaintiff,	)	No. CV-09-230-MO
	)	
vs.	)	
	)	March 11, 2010
MICROSOFT CORPORATION,	)	
	)	
Defendant.	)	Portland, Oregon
	)	

Oral Argument

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MICHAEL W. MOSMAN

UNITED STATES DISTRICT COURT JUDGE

APPEARANCES

FOR THE PLAINTIFF: Mr. Gary Odom, pro se
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Portland, OR 97209

FOR DEFENDANT MICROSOFT CORPORATION: Mr. Joseph A. Micallef
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(P R O C E E D I N G S)

THE CLERK: Your Honor, this is the time set for oral argument in Civil Case 09-230-MO, Gary Odom v. Microsoft.

And would the parties, beginning with plaintiff, please identify yourself for the record.

MR. ODOM: Gary Odom, plaintiff.

MR. MICALLEF: Joe Micallef of Arnold & Porter for Microsoft.

THE COURT: We're here to figure out basically what to do with this case at this point. Mr. Odom has filed a motion to dismiss based on a conversation we earlier had on the record by telephone.

Microsoft has counterclaims against Mr. Odom which, as I understand it from a recent submission, it intends to continue to pursue. Is that right?

MR. MICALLEF: That's right, Your Honor.

THE COURT: And I am persuaded that it's not within my power to simply dismiss them even without prejudice at this point.

If I recall correctly, we left off at about the stage of expert witnesses being identified. That was one of Mr. Odom's complaints was that he didn't have the experts he wanted or they didn't say what he had intended for them to be saying.

So what is your suggestion, sir, for proceeding at this point, what you're hoping to see happen?

MR. MICALLEF: Me, Your Honor?

THE COURT: Yes.

MR. MICALLEF: I think we should pick up the schedule where we left it off, which was just after the service of opening expert reports, and go from there.

THE COURT: Meaning that you want rebuttal experts and then what?

MR. MICALLEF: And then deposition -- the way the schedule was before, was there was a date for opening expert reports, a date for rebuttal, I think there was maybe one other date for secondary considerations of non-obviousness, just because that's how that works, and then some time for depositions of experts. Fact discovery is over. We're past that point.

THE COURT: And then dispositive motions?

MR. MICALLEF: And then dispositive motions scheduled, and then the usual pretrial and trial, if necessary.

THE COURT: Do you -- so you have not yet retained any rebuttal experts?

MR. MICALLEF: Well, we've retained them. Your Honor stayed the schedule just after we served our opening invalidity report, so I have a report on non-infringement to

serve, and will in very short order.

THE COURT: A rebuttal report?

MR. MICALLEF: A rebuttal report on non-infringement.

I received an infringement report from Mr. Odom's prior counsel, although I guess since then he has told me that he has withdrawn that report. I don't know where that stands, but -- so I'm ready with experts as soon as the Court wants to go forward.

THE COURT: I'm sure you've thought about this, but your concern, of course, is that you could face all of these issues later, so you hope to obtain some kind of preclusive effect from this litigation, and yet you face the issue of litigating whether a pro se defendant against your counterclaims represents a full and fair opportunity to litigate this matter.

I guess you've concluded that you are prepared to argue at some point in the future that it does?

MR. MICALLEF: I have thought about this question quite a bit, Your Honor, but my client is in a somewhat impossible position. Mr. Odom has not only sued Microsoft but has stated expressly that if the Court dismisses without prejudice, he's coming after us again. He's going to come for not only damages in the amounts of many tens of millions of dollars but for an injunction against the sale of

Microsoft Office and for enhanced damages. He has sued our licensees. As you might know, Your Honor, Microsoft has offered to license its Ribbon technology to the world, or its interface to the world for free, and many have taken that up. He's sued them in the Autodesk case and the Attachmate case. There is no reason to believe that he won't sue others who may be customers of Microsoft, Hewlett-Packard, among others, who sell products like computers with Microsoft Office.

He's already cost us a lot of money. He's published outrageous statements about my client, about individual employees of my client. It's sort of an impossible situation.

THE COURT: You feel like you've made the best choice you can?

MR. MICALLEF: I feel like we have to go forward and my client feels like we have to go forward.

THE COURT: All right. Thank you.

Mr. Odom, what we're contemplating here is the filing of rebuttal expert reports, which Microsoft has apparently already in hand. You would not be obligated to see that one is prepared and file it; you could or could not, as you chose. I would not allow depositions of experts. I think that would be pointless here.

So following the preparation of any rebuttal

expert reports, we would proceed to summary judgment, dispositive motions, but that probably just means that Microsoft would file a motion for summary judgment, and that motion would be premised on the idea that even taking the facts in the light most favorable to you, there's some legal argument why they should win, that your claim can't stand on even your own allegations of fact.

Occasionally it also means that someone says that there's no actual factual support for an allegation a plaintiff has made, that although the allegation was made in the complaint, it ended up as discovery progressed that it just never had any evidence to support it, and therefore should get dumped before trial.

And then if Microsoft prevails at that stage, that ends this case with prejudice against you. The reason -- the most common reason why summary judgment motions lose is one of two: either they've made a legal argument that doesn't work -- for example, Microsoft might say, Mr. Odom claims that X set of facts amounts to infringement, and so even taking Mr. Odom at his word, X set of facts does not amount to infringement. So one common way summary judgment doesn't work for a party like Microsoft is that the judge simply disagrees with their legal argument and says it might, it might be infringement, let's let a jury decide.

The more common, the most common reason why

summary judgment gets denied is that Microsoft contends that there's no real dispute of fact based on evidence that would support your claims, and a plaintiff is able to respond by saying, yes, there is at least one or perhaps several disputes of fact. And so we have to let a jury decide that.

So just to pull one out of thin air that doesn't have anything to do with this case, perhaps a plaintiff would allege customer confusion in a trademark or copyright case, and a defendant would come in and say there's no evidence of customer confusion. Summary judgment would get defeated in a case like that just by a plaintiff saying, "Well, no, I have these pieces of evidence that show the possibility of customer confusion."

So that's where we're headed. If Microsoft wins at summary judgment, then the case is over. If they lose, we would be heading towards trial.

I recognize that all of this puts you in an equally impossible position. I have made the decision that I cannot indefinitely delay the case while you seek to obtain counsel that would allow you to proceed with the case. And so there is no real satisfactory answer to the issues that face us.

I am going to proceed with some sort of schedule that gets us to the point of summary judgment, which may involve, depending on what you decide to do about rebuttal

experts, nothing in the short term that needs to be done on your behalf, and your best efforts just to try to answer as best you can Microsoft's motion for summary judgment.

I'll turn to you to put anything on the record you'd like to put on the record about any -- going forward in this case.

MR. ODOM: Thank you, Your Honor. Should I stand or is sitting okay?

THE COURT: You can sit is fine.

MR. ODOM: Thank you.

One aspect that troubles -- there's a lot of aspects that trouble me. In the large, I am overwhelmed, shall we say, being a single individual. I have friends who are attorneys and I have clients who work in this field also, and by myself, as you know, a practitioner in the patent law field, but I'm not an attorney and have just a solo business with a young man as a partner. So taking this on pro se is overwhelming. I'm at least smart enough to know what I don't know and to not overreach, and proceeding constitutes that, in my mind.

On a more particular point, my erstwhile attorneys did nothing, nothing with regard to discovery. They gained no information about Microsoft's products or anything that would be useful to me with regard to a fact basis. I have only a small sample of public information in order to

proceed. That puts me in a considerable disadvantage in proceeding. I do not have the financial resources nor the human resources to proceed other than by myself, and I work full time.

So you understand my situation with regard to the large and with regard to the particulars. That's all I would have to say on that particular issue.

Before we dismiss, I have another issue that I'd like to address with the Court, but it is outside the context that we're talking about with regard to proceeding.

THE COURT: All right. Then let's proceed with the current scheduling issue.

MR. ODOM: I have one more thing to say, Your Honor.

THE COURT: About scheduling?

MR. ODOM: Yes.

THE COURT: Go ahead.

MR. ODOM: I have to -- I have to apologize beforehand to you. I may know a little bit about patent law as far as its substance goes. You've seen my letters. You know, hopefully, that I at least can write intelligible sentences and quote case law. I know next to nothing about federal procedure, and so I'm afraid mostly that I would fall down either in what I don't say that I should say, and vice versa, what I say that I shouldn't say. So please

accept my apology beforehand for my shortcomings with regard to procedure and etiquette of which I am simply untrained and ignorant.

THE COURT: That's fine. You're not the first person to appear pro se in front of me, and won't be the last.

Your position is one that really depends on future events as much as anything. What we've talked about here already is to what degree this case will have preclusive effect on you in the future, meaning in what degree will the decisions that have already been made or will be made in the future, in what degree will they be binding on you if you were to try to sue Microsoft for these same issues again or sue other related entities on these same issues or claims. And that's just not something that anybody in the room knows the answer to. You don't know whether you'll be able to pick up and make this happen again in the future or not. If you do, it will just be a matter to be litigated. I'm not going to pretend to try to figure out what's binding and not binding. Clearly, to have this case proceed forward is going to create at least a very serious risk for you that the decisions made will be permanently binding upon you.

I'm not convinced that proceeding to summary judgment dramatically changes your exposure for a decision being future -- binding on you in the future, since it

appears to me likely that Microsoft's motion for summary judgment will be premised almost entirely on claim construction. Claim construction, although you object to the conduct of your attorneys, did occur during the normal course of litigation in this case.

And so I guess that's a long way of saying that this case may damage you, but probably most of the damage has already been done so that if in some future date you seek to undo the damage through litigation, I'm not sure your position is significantly worsened by my decision to proceed to the end of this case.

On the other hand, I don't have much other choice. There are claims against you. I'm not at liberty to just erase them or make them go away. They need to be brought to a final conclusion. I have made the decision not to wait further for you to obtain counsel, so we'll just have to wrap this up.

You will file, then, as of what date your rebuttal expert report on behalf of Microsoft?

MR. MICALLEF: I think, Your Honor, I would need -- May I remain seated?

THE COURT: Yes.

MR. MICALLEF: I think I can do it within a week, less if you really -- if you need it quicker.

THE COURT: No. So that means that by the 18th --

MR. MICALLEF: I can do that.

THE COURT: -- you'll file your rebuttal expert report.

And that's the same date, Mr. Odom, if you choose to do so, you can file anything you wish to file with regard to expert statements. I suspect that's not in the cards, but you are free to do so.

MR. ODOM: Thank you, sir. It's not in the cards.

THE COURT: And then that will close not just fact discovery, which has previously closed, but expert litigation.

I'll tell you candidly that I'm going to look carefully at whether your rebuttal expert report is suitable for reliance for dispositive motions, and to the degree that I can resolve the case without relying on it, I will, since that puts us in a more pristine posture with regard to Mr. Odom's represented status in the case.

But in any event, we'll take a look at dispositive motions. How soon after you file your rebuttal expert report are you prepared to submit your own dispositive motions?

MR. MICALLEF: Perhaps two weeks, Your Honor.

THE COURT: And could you help me with that? How far after the 18th is two weeks?

THE CLERK: That's going to be March 1st -- or

April 1st.

THE COURT: So April 1st, Microsoft will file dispositive motions.

Mr. Odom, on the one hand I take seriously and at face value your candid statements that you feel overwhelmed by this procedure. That's understandable, and I have no reason to doubt that that's the position you're actually in.

On the other hand, more than many pro se plaintiffs, you are in a position to at least take a shot at some sort of response. And you've asked for the Court's indulgence in not complying neatly with all the forms and rules, so I'm just simply going to try to give you an opportunity to file, either by letter form or in another format you're comfortable with, your best answer to what you read from Microsoft when you get its motion for summary judgment. So I'm hopeful that it will be decipherable, and I've tried to suggest to you that there are really typically two issues: one is that there remains, despite what Microsoft contends, some fact that's really not uncontroverted that would point to factual controversies that Microsoft cannot resolve by saying there's simply no dispute; and the other is more difficult for you, and that is that the legal theory Microsoft rests on, saying, well, patent law doesn't recognize this cluster of facts as a viable claim, you need to try your best to say, well, yes,

patent law does recognize the possibility that this cluster of facts represents a viable claim.

So I'm not holding you to format rules or anything like that, but I'm going to start out by assuming that a month later, you could file a response.

And I assume that's May 3rd. Is that the Monday that would follow?

THE CLERK: What was the date that you had me do that?

THE COURT: April 1st, 30 days later.

THE CLERK: Yes, May 3rd.

THE COURT: So May 3rd, 2010 would be the date for Mr. Odom's response to Microsoft's motion for summary judgment.

And then you'd want about two weeks to reply?

MR. MICALLEF: Yes, Your Honor.

THE CLERK: And that would be --

THE COURT: The 17th?

THE CLERK: -- yes, the 17th.

THE COURT: May 17th, 2010 for Microsoft's reply.

Once the briefing is done, I'll make a decision. That decision may or may not require oral argument, and I'll just -- I won't know the answer to whether we'll hold a hearing until I see all the briefing.

Again, this is the kind of case typically where

oral argument typically would not be helpful, except that your experience in the industry, your expertise in the industry may in fact make you someone among pro se plaintiffs who is far more qualified than the average to have something helpful to offer in oral argument. We'll just wait and see. If I hold oral argument, I'll give you notice of it in time to get ready for it. If not, I'll simply issue a written opinion, outlining my answer to essentially the question being raised by summary judgment.

I think it's probably the wiser course not to schedule anything past that point. If summary judgment is denied -- and I have obviously no opinion one way or the other on that -- the idea that we would try this case boggles the mind, and so I'm just hoping to figure out how that might work out if we get to that point.

The fact -- I assure you, Mr. Odom, the fact that, for all of us, you included, a trial seems a difficult matter will have no impact on my decision whether you win or lose at summary judgment. We've had pro se trials before, and we do our best to make sure it's fair.

And, of course, I hope it goes without saying that in all of this, you're at liberty at any point to seek to obtain counsel and interject counsel into the proceeding at any point you're able to do so.

So we'll not schedule anything beyond the last

filing for summary judgment. And then shortly after any resolution of summary judgment, assuming it's necessary, we'll make further scheduling decisions about preparation for trial and trial.

Mr. Odom, anything further today, sir?

MR. ODOM: Yes, two things. Number one, I will do my best to conform and meet my obligations here.

THE COURT: Thank you.

MR. ODOM: The other matter is with regard to the unsealing of the telephone status conference that occurred on December 2nd.

THE COURT: Yes.

MR. ODOM: There was a statement that said that communications disclosed in the unsealed portion do not fall within either attorney-client privilege or work product doctrine.

I am forced to disagree. I don't understand why that portion -- the portion was unsealed. The portion that was unsealed was of my erstwhile attorney, Ed Goldstein, reading an e-mail to you out loud, an e-mail that I had written to Ed Goldstein that said that it was confidential and legally privileged. That was a communication from me to Ed Goldstein. My understanding is that Ed Goldstein's reading of that to you was a breach of his duty of confidentiality, that that is a communication that is not to

be disclosed to the public, that there is an issue with regard to attorney-client privilege.

I would motion the Court to rescind and expunge that from the record. If the Court for some reason desires to have -- and it was taken out of context. The truthfulness of Ed Goldstein's reading and the context in which it occurred, the entire e-mail, cannot go undisputed. I have the entire e-mail. If you wish to have an in-camera inspection of the entire e-mail, I can provide it to you.

Once again, I don't quite know what the situation is, what your motivation is or what the legal parameters are, but it didn't seem copacetic to me.

THE COURT: All right. I am not going to currently debate work product or attorney-client privilege. I will explain that the reason the statement was put into the record is that I was forced to make a decision about whether to allow the case to proceed without allowing you further time to obtain counsel. That document or that exchange went to that issue in a way that formed part of the reason why I was unwilling to devote further time to you seeking to obtain new counsel.

Today I'm going to take your statement as, at a minimum, a couple of things: One, a request to supplement the record with the rest of the e-mail. If that is what you'd like to do, if you'd like to have the rest of the

e-mail in the record, then I will grant that request. Is that what you'd like to do?

MR. ODOM: Not -- no, Your Honor.

THE COURT: Well, let me tell you the second thing I think you're doing, and that may affect your answer to the first.

The second is that I am taking it as a request to seal that portion of the record so that it's a part of the record but not generally available to the public, and to the degree you're requesting that, I will also grant that request.

MR. ODOM: (Nods head.)

THE COURT: Are you requesting that that transcript be sealed?

MR. ODOM: Yes, Your Honor.

THE COURT: I grant the request that that transcript be sealed.

On a sealed basis, would you like the remainder of the e-mail to be made part of the record?

MR. ODOM: Yes, Your Honor.

THE COURT: I will also grant that request. Will you submit a copy of that to the Court?

MR. ODOM: Yes, Your Honor.

THE COURT: You can do that by simply attaching it as an e-mail to Ms. Stephens, unless you'd like to just

leave a physical copy of it here today.

MR. ODOM: I do have a physical copy of it.

THE COURT: Then if you'll forward that to the courtroom deputy, she'll mark it as an exhibit, it will be received, and I will make it a sealed part of the record in this case.

MR. ODOM: Thank you, Your Honor.

THE COURT: For Microsoft, anything further today?

MR. MICALLEF: I have nothing, Your Honor. Thank you.

THE COURT: Very well. We're in recess.

(Proceedings concluded.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature or conformed signature is not certified.

/s/Bonita J. Shumway *3/16/10*

BONITA J. SHUMWAY, CSR, RMR, CRR DATE
Official Court Reporter